CKS Tool & Engineering, Inc. of Bad Axe *and* Randy Wierzbicki. Case 7–CA–40332

December 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On November 17, 1998, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, CKS Tool & Engineering, Inc. of Bad Axe, Bad Axe, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discharging employees because of their concerted activities protected by the National Labor Relations Act."

2. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer Randy Wierzbicki full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

"(b) Make Randy Wierzbicki whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision."

3. Add the following as paragraph 2(d) and reletter the subsequent paragraphs.

"(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because of their concerted activities protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[1] In excepting to the judge's finding that alleged discriminatee Randy Wierzbicki's comments to Plant Manager Tom Carriveau at the Sept. 11, 1998 meeting were concerted, the Respondent relies, inter alia, on *Manimark Corp. v. NLRB*, 7 F.3d 547 (6th Cir. 1993), where the court, in reversing the Board's finding that the employer had unlawfully discharged an employee, found the employee's conduct at issue was not concerted. Since the facts in *Manimark Corp. v. NLRB*, supra, are readily distinguishable from those of the present case, we find the Respondent's reliance on that case misplaced.

In *Manimark*, the court concluded that the evidence was "too thin" to support a finding that Fields, the alleged discriminatee, "was acting on behalf of anyone other than himself" in his meeting with Morris, the employer's vice president and general manager. In reaching this conclusion, the court found it 'significant' that Morris summoned Fields to his office to discuss a compensation matter that affected only Fields, i.e., "a purely personal complaint." Id. at 550. The court further found that in his meeting with Morris, Fields had only added as an "afterthought" that he and others had complained about certain issues. Id. Finally, the court found that Fields' failure to notify his fellow employees after the meeting that he had raised these issues with Morris, as well as his refusal to follow through on Morris' suggestion that Fields arrange a group meeting to discuss the employees' concerns, further evidenced that Fields was not engaged in concerted activity when he listed these concerns for Morris. Id. at 550–551. By contrast, the judge found, and we agree, that the concerted nature of Wierzbicki's conduct is found in his raising of group concerns about productivity in a group meeting called by the Respondent to discuss productivity and efficiency. Finally, in finding the Respondent's exception without merit, we note that in *NLRB v. Talsol Corp.,* 155 F.3d 785 (6th Cir. 1998), the court distinguished *Manimark*, supra, and found an employee's conduct in raising group concerns at a group meeting called by management, conduct substantially similar to Wierzbicki's conduct at issue here, constituted concerted activity. Id. at 796–797.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container, Inc.,* 325 NLRB 17 (1997).

WE WILL, within 14 days from the date of the Board's Order, offer Randy Wierzbicki full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Randy Wierzbicki whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Randy Wierzbicki and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CKS TOOL & ENGINEERING, INC. OF BAD AXE

Amy J. Roemer, Esq., for the Acting General Counsel.
Brian M. Smith, Esq. (Brian M. Smith & Associates, P.C.), of Troy, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The trial of this case was held before me on July 14, 1997, at Bad Axe, Michigan, pursuant to an unfair labor practice charge filed on October 20, 1997, by Randy Wierzbicki, an individual, against CKS Tool & Engineering, Inc. of Bad Axe, and a complaint issued by the Regional Director on January 30, 1998. The complaint alleges that the Respondent terminated Randy Wierzbicki on September 11, 1997, because he had engaged in alleged concerted activities protected by the Act. The Respondent filed a timely answer which denied the unfair labor practices and which raised as a defense that Wierzbicki had resigned voluntarily on September 11, 1997, or alternatively was discharged on September 12 for just cause because he had acted individually, not concertedly, in a "threatening, hostile manner to management employees" at a confrontation during an employee meeting conducted by the Respondent. The Respondent contends that Wierzbicki, after the aforesaid misconduct, refused to return to his workstation and left the plant without permission. The issues raised by the pleadings and the proofs are whether the Charging Party engaged in concerted protected activity at the employee meeting and, if so, whether he lost any protection afforded under the Act for such activity by insubordinate and abusive conduct directed toward the plant manager at and after the meeting on September 11, and again on September 12, 1997.

At the trial, the parties were given full opportunity to adduce relevant testimonial and documentary evidence and to argue orally. They were also afforded opportunity to submit posttrial briefs, which were received on September 15 and 18, 1998.

The briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of facts and conclusions. Portions of those briefs have been incorporated, sometimes modified, particularly as to undisputed factual narration. However, all factual findings are based on my independent evaluation of the record. Based on the entire record, the briefs, and my observation and evaluation of the witnesses' demeanor, I make the following findings.

I. JURISDICTION

At all material times, the Respondent with an office and place of business in Bad Axe, Michigan, (the Respondent's Bad Axe facility), has been engaged in the manufacture, nonretail sale and distribution of toolholders, various machine tools and assembly parts, and hot and cold forging. During the 12-month period immediately preceding the filing of the charge, a representative period, the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000 and has purchased goods and materials valued in excess of $50,000 from suppliers located outside the State of Michigan and caused said goods and supplies to be shipped directly from points located outside the State of Michigan to its Bad Axe facility.

It is admitted, and I find, that at all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates a tooling and engineering facility in Bad Axe, Michigan, a largely rural area in the northern center of what is colloquially termed the Michigan "thumb." The Respondent employs approximately 200 employees in various departments at its Bad Axe facility, including shipping, grinding, lathe, EDM, mill, saw, CAM, and heat treat. Thomas Carriveaux has been the plant manager since 1990. At all times material, Mark Essenmacher was the mill department supervisor and Chad Gembarski was the second-shift foreman. All are admitted supervisors and agents of the Respondent within the meaning of the Act. Michael Ornowski is currently employed by the Respondent as a sales and process engineer but on September 11, 1997, he held the position of mill department programmer. At that time, Gregg Irwin held the position of training coordinator.

The Respondent is an "ISO 9000" manufacturer, a classification instituted by the automotive manufacturing industry that certifies that the manufacturer meets certain standards set industry-wide. Pursuant to that program, the Respondent holds weekly meetings in its departments to discuss issues that arise on the production floor. These meetings are mandatory and in addition to attendance by the hourly department employees, the supervisor of the department and the supporting CAD-CAM people also attend. The grind department meets on Tuesdays, the lathe department on Wednesdays, and the mill department on Thursdays. The meetings generally last for 30 minutes and are held in the employee lunchroom, which is away from the production floor. Meetings in the mill department with about 10-day shift and 6 or 7 second-shift employees are normally conducted by Essenmacher and sometimes Irwin. Carriveaux testified that he only attended these meetings when "extenuating circumstances" warranted it, e.g., announcements of new production procedures. On Thursday, September 11, 1997,

both Essenmacher and Irwin were absent from the plant. Accordingly, it became Ornowski's duty to conduct the mill department meeting with the assistance of Carriveaux. Ornowski had little past experience in such duties and had never before conducted a full meeting. General Counsel witness Ronald Landenberg, a Respondent employee since 1993, had regularly attended these meetings. According to his uncontradicted and credible testimony, these meetings did not normally take the polite format of a classroom exercise at which employees sat sedately, auditing the supervisor's presentation, and speaking only upon being recognized by the raising of hands. He testified without contradiction that it was not uncommon for employees to speak spontaneously without waiting for recognition from the speaker. The exception, he testified, was when the plant manager addressed them. On those occasions, the employees usually remained passively quiet.

Randy Wierzbicki was hired by the Respondent in April 1995 and was employed on the second shift as a mill operator on September 11, 1997. Carriveaux testified that according to undated, unspecified reports from unnamed supervisors, Wierzbicki had become argumentative and "disruptive" in an unspecified manner during meetings conducted by them on unspecified occasions. No supervisor testified in corroboration of Carriveaux, but neither was his testimony rebutted. However, he admitted that Wierzbicki had never been reprimanded for inappropriate conduct at such meetings in the past and that his personnel file is silent about such conduct. I must conclude, therefore, that based on Landenberg's and Carriveaux's testimony, vigorous argumentation at such meetings between supervisors and employees, particularly Wierzbicki, had become the tolerated practice. It is also undisputed that vulgar "shop talk" laced with the four-letter "F" word is common in the facility and frequently used during arguments between employees and supervisors.

Carriveaux testified that with respect to the meetings on or about September 11, 1997, he decided to attend because he had become concerned about an increase in scrap rate and a "problem at that point with profitability." He described his function as to make "kind of a personal plea from me to get some people, to identify their problems and fix them." Thus, he intended to elicit employee interaction at the meeting.

B. The September 11, 1997 Confrontation

The second shift commenced at 3:30 p.m. and ended at 11 p.m. Wierzbicki testified that prior to the scheduled 3:30 p.m. meeting of afternoon shift employees on Thursday, September 11, rumors had been afloat in the plant which disclosed that Carriveaux had attended earlier meetings that week for other department employees to "hash out our problems" regarding the causes for production scrap and ways to improve production. He testified that prior to the mill department meeting, he had discussed with his coworkers the fact that production employees were going to get a "talking to" regarding the scrap rate as a profitability issue, and yet the Respondent could afford to send nonproduction persons to tool shows. In cross-examination, he admitted that he did not initiate these discussions nor did he go and seek out the employees' opinions. Landenberg corroborated Wierzbicki by testifying that prior to the September 11 second-shift mill department meeting, the employees did discuss among themselves the anticipated topic of an improved production demand and that they jointly complained that the Respondent's managers had always demanded increased production from its employees as a cure to profitability problems while simultaneously maintaining unnecessary nonproduction personnel and positions. Thus, prior to the meeting, Wierzbicki had been exposed to and joined in employee group discussions, wherein common employee resentment was jointly expressed toward Carriveaux's anticipated demand for improved employee production as a solution to company profitability problems.

The meeting commenced at 3:30 p.m. under Ornowski's lead. Ornowski did not testify in detail about what he said for about 10 minutes until about 3:40 p.m., when Carriveaux appeared and assumed leadership and commenced to speak. After only a few minutes, if that long, he was confronted from the floor by Wierzbicki. Five witnesses testified as to Wierzbicki's conduct. The General Counsel presented the detailed testimony of Wierzbicki and Landenberg. The Respondent presented the somewhat detailed testimony of Carriveaux and the supposedly corroborative but generalized testimony of the subsequently promoted Ornowski, and even more generalized and conclusionary testimony of mill department employee Stan Wessels.

In his testimony, Carriveaux attempted to paint a picture of an intimidated and frightened 5 foot–9 inch short plant manager who was verbally abused and physically overshadowed by a menacing, huge, 6 foot–3 inch tall, 250-pound, heavy, robust, resonant voiced employee who constantly interrupted Carriveaux's presentation with language salted with the "F" word by shouting his individual protest of nonresponsibility for scrap and production problems accompanied by body language suggestive of possible workplace violence, i.e., stiff-standing body posture, clenched fists, and flushed, angry face. However, even under Carriveaux's version of the facts, Wierzbicki did not explicitly insult Carriveaux's character or integrity, did not resort to denigrating name-calling, and did not explicitly threaten physical violence.

Wierzbicki characterized his behavior as respectful to the extent that he only spoke initially and thereafter when Carriveaux recognized his hand-raised request to do so and sat and spoke quietly and politely during the entire encounter until he was ordered to leave by Carriveaux at which point he then began using loud, vulgar language as he stood up and departed, but remaining in self-control at all times without clenched fists or other threatening gestures. Wierzbicki testified that he spoke not with the individual "I" in addressing Carriveaux, but that rather he utilized the first-person plural "we," e.g., "we machinists, we are human beings," "we make mistakes" because of errors in blueprints, etc.

There is also a dispute as to who left the meeting first. According to Wierzbicki, Carriveaux left first. According to Wierzbicki, he and Carriveaux had a second confrontation at the timeclock, which is located on the path to Wierzbicki's workstation where Wierzbicki was headed. According to Wierzbicki, Carriveaux had reached the timeclock before him and was standing there waiting when Wierzbicki encountered

him and asked his employment status but was told only to keep going out the front door.

Carriveaux testified that not only did Wierzbicki leave the meeting first, which he was ordered to do, to return to his work station, but that he proceeded to the timeclock which is unseen from the meeting room which is the lunchroom but from which point the timeclock's activation mechanism was audible. According to Carriveaux, Wierzbicki hit the lunchroom table at which he was sitting 6 to 8 feet across from Carriveaux and stomped rapidly out of the room, after which Carriveaux, still in the room until he left at 3:52 p.m., heard the timeclock cycle. Carriveaux testified that he remained in the room for about 3 to 5 minutes and finished his remarks and departed at 3:52 p.m. He testified that he departed and encountered Wierzbicki at the timeclock, body stiff with anger and fists clenched but not above waist level, hovering over him and demanding to know if he still had a job. Carriveaux testified that he was alarmed by this menacing demeanor and responded:

> Randy, I am worried that something could develop here. It would be better just to leave the building right now.

Thereafter, Carriveaux engaged in a somewhat unclear and shifting explanation as to when he actually decided to discharge Wierzbicki. Leading examination did not enhance his credibility nor did it encourage a convincing demeanor. At first, he testified that he made the discharge decision on September 11 upon consideration that Wierzbicki had violated the Respondent's employee work rule by engaging in insubordination and by abandoning his work by punching out. As to the latter contention, if Wierzbicki had indeed been ordered only to leave the lunchroom and not the building and had in fact punched out contrary to instructions to go back to work, then the question arises, why did he wait for Carriveaux at the timeclock and inquire as to his status and not actually leave the building until Carriveaux ordered him to do so? Such conduct at least implies that at the very least, Carriveaux's order to leave the lunchroom was ambiguous. Yet, Carriveaux testified that he "figured" that Wierzbicki had quit.

In continuation of his testimony regarding the timing of the discharge decision, Carriveaux next testified that on September 11 after Wierzbicki departed, he had only 80 percent to 90 percent decided to discharge Wierzbicki. Then he went on to testify even more confusingly that he probably would not have fired Wierzbicki had not the latter confronted him the next day by entering his office, thrusting his face into Carriveaux's face with his hands on Carriveaux's desktop demanding, "Do I still have a job?"—strange conduct indeed for someone whom Carriveaux figured had voluntarily quit. According to Carriveaux's testimony, at that point, he now decided to discharge Wierzbicki because Wierzbicki's hostile menacing attitude on September 12 gave him "no choice" but to do so. They then had some minor argumentation over Wierzbicki's right to personally retrieve his personal tools from the shop over Carriveaux's refusal for fear of "work place violence."

In cross-examination as to his prior testimony that the discharge decision had been formulated on September 11, he testified:

> [JUDGE] Q. Before he came in the next day, from your testimony, it's not clear that you had actually made a decision to discharge him?
> [CARRIVEAUX] A. I hadn't. In my mind—I hoped that when he left that meeting he was just going to go back to his department and go to work, but instead he was—he had punched out and he was standing there waiting from me.
> And then the next day, you know, when he came in and just put his face in mine again, I just [didn't] know what other options I had.
>
> [JUDGE] Q. So it wasn't until that point, the next day, that you decided to discharge him?
> [CARRIVEAUX] A. Yes.

Finally, in cross-examination, he testified:

> [ROEMER] Q. Isn't it true that you discharged him because of the meeting.
> [CARRIVEAUX] A. No, it is not true.

In redirect examination, Carriveaux provided more surprising testimony.

> [SMITH] Q. Okay, Tom, Mr. Carriveaux, you previously testified, correct me if I'm wrong—was he insubordinate to you at the meeting?
> [CARRIVEAUX] A. Not at the meeting.
>
> [SMITH] Q. I mean the employee meeting.
> [CARRIVEAUX] A. Well—
>
> [SMITH] Q. I'm talking about the meeting on the 11th of September, when he was loud—[was] he loud at the meeting? I don't want to rehash this whole thing, but you went through a ten minute situation with him, what did you consider his conduct to amount to at that meeting?

Despite this grossly suggestive examination by the Respondent's counsel, Carriveaux hesitantly and unconvincingly responded:

> [CARRIVEAUX] A. Well, very loud and it scared me. It would—I think it would technically be insubordinate to do that to your—

Counsel for the Respondent thereupon directed the witness' attention to company work rules regarding leaving work without permission, and he then elicited testimony that well, yes, Wierzbicki did violate that rule. This whole line of leading questioning and responses did absolutely nothing to enhance Carriveaux's credibility.

In recross-examination, Carriveaux confirmed that he indeed had not discharged Wierzbicki on September 11 but had hoped that Wierzbicki would return to work "calm and ask—and that we could get back together." This is a very curious response because if Wierzbicki had not been terminated, what is the meaning of Carriveaux's implicit testimony that there was a need to "get back together," i.e., to repair the ruptured employment relationship. Carriveaux would have been more convincing and would have made much more sense had he testified

that he had discharged Wierzbicki on September 11 but that he would have rescinded that discharge upon evidence of Wierzbicki's contrition and request for reemployment.

Wierzbicki testified that he would have proceeded to his workstation after being ejected from the meeting had not Carriveaux ordered him to leave the building during the timeclock confrontation and that he had punched out only after having been so ordered. He testified that he arrived at the facility the next day, September 12, at 3:15 p.m. to discuss the status of the work being done before punching in at the timeclock. He then testified as follows. He proceeded to retrieve his safety goggles when he saw supervisor Essenmacher and asked him "what was up," because he was not completely certain of his employment status, and Essenmacher told him that he was no longer employed by the Respondent. Upon being asked to see Carriveaux and obtain a reason for the termination, Essenmacher proceeded to make an in-plant telephone call wherein he asked to speak to Carriveaux. After a telephone conversation wherein he relayed the request, Essenmacher escorted Wierzbicki to the front office area where Wierzbicki was told to wait until Carriveaux was ready to see him. There he waited for 1–1/2 hours until Carriveaux appeared and instructed him to enter his office. According to Wierzbicki, he was not out of control nor enraged. He testified that he was fearful that his job was in jeopardy at a time when he not only had to support a wife but also a newborn child. He denied leaning on Carriveaux's desk and denied clenching his fists. According to Wierzbicki, he asked, "What's up, what's going on?" At that point, Carriveaux looked up from his desk and told Wierzbicki that it was time he looked for another job. When asked for the reason, Carriveaux refused to give him one. When Wierzbicki stated that he would need to talk to the Michigan Employment Security Commission, Carriveaux only responded, "I will meet you there." At that point, there was a dispute as to whether Wierzbicki could personally retrieve his toolbox, which he did contrary to Carriveaux's order not to enter the work area.

As to who left the September 11 meeting first and what Carriveaux told the employees, if anything, about the employment status of Wierzbicki, there is a conflict between the testimony of the other witnesses. Ornowski and Wessels testified that Carriveaux ordered Wierzbicki to "leave the meeting," that he did so, and that Carriveaux followed him out a few minutes later after one of them heard the timeclock activate seconds after seeing Wierzbicki pass the lunchroom window to the corridor leading to the timeclock. Ornowski testified that Carriveaux returned 3 to 5 minutes later and put the now disrupted meeting back to order as the employees sat "gossiping" among themselves. He failed to testify precisely to what Carriveaux said when he returned. Wessels testified that when Carriveaux returned, he apologized for the disruption. He also did not testify as to precisely what Carriveaux said.

Landenberg testified that Carriveaux had walked to the door and it was not until Wierzbicki made a comment to Ornowski that Carriveaux, at the door, told Wierzbicki "why don't you get up right now and get out of here." According to him, Wierzbicki arose from a sitting position at the table and departed, shortly after which Carriveaux followed him. Wessels and Ornowski both testified that Wierzbicki was sitting at the table, not standing, when ordered to leave. They testified that Wierzbicki either banged or slapped the tabletop as he stood up to leave. Landenberg testified that it was the first time that Wierzbicki stood during the entire meeting. He testified that at no time did Wierzbicki, who was always in his view, clench his fists, and he had no recollection that Wierzbicki slapped or hit the table as he stood up. Neither Wessels nor Ornowski explicitly contradicted Landenberg's testimony that Wierzbicki had not stood up until after he was ordered to leave.

Carriveaux testified that he became frightened when a red-faced Wierzbicki stood 6 feet away from him with clenched fists, standing and banging on the table while using profanity. The implication is that, in part, this is what caused him to order Wierzbicki to leave, i.e., standing and banging the table. However, later in his testimony, he testified that when he asked Wierzbicki to leave the meeting, "that's when he stood up and hit the table like that and went stomping out." Clearly then, the testimony of Wierzbicki and Landenberg that Wierzbicki did not stand at any time during the meeting until ordered to leave is credible and, thus, Wierzbicki did not, prior to that moment, stand menacingly with clenched fists in confrontation with Carriveaux. Instead, he sat across a lunchroom table 6 to 8 feet across from Carriveaux in which position his extra height and alleged body-stiffened position were mitigated. Further, the evidence now reveals that if he banged the table, it was after he was ordered to leave.

Landenberg testified that when Carriveaux returned to the meeting, he told the employees, "Randy Wierzbicki will no longer be with us." If this statement was meant to be limited to Wierzbicki's nonattendance at the meeting, it would have been totally superfluous as he had already been obviously ejected. That it referred to Wierzbicki's employment status conflicts with Carriveaux's ultimate testimony that he did not discharge Wierzbicki until September 12 after a confrontation in his office. The Respondent, however, did not choose to adduce the testimony of its supervisor, Essenmacher. Thus, in light of Landenberg's testimony, which is not explicitly contradicted by Wessels and Ornowski, and in light of Wierzbicki's uncontradicted testimony, Essenmacher informed Wierzbicki he had been discharged prior to his shift start on September 12 and that is the reason for the confrontation which followed. I must discredit Carriveaux's testimony as to the date he decided to discharge Wierzbicki and find this testimonial credibility as to the confrontation of September 11 and 12 severely impaired.

I conclude that regardless of Wierzbicki's conduct on September 12, he had already been discharged for his conduct at and/or shortly after the meeting on September 11. Furthermore, a resolution of credibility as to what his conduct at the meeting had been on September 11 will also resolve credibility between Carriveaux and Wierzbicki as to Wierzbicki's conduct after the meeting.

To some degree, I find both Wierzbicki and Carriveaux to be less than candid witnesses. Wierzbicki's self-portrayal of having engaged in an almost classroom-courteous manner prior to being ordered to leave was contradicted by General Counsel witness Landenberg, who had testified that Wierzbicki had engaged Carriveaux in an "F" word-laced verbal confrontation after interrupting Carriveaux's initial representation. Car-

riveaux's testimonial credibility impairment, as noted above, is severe. The proffered corroboration of Ornowski and Wessels is conclusionary and generalized. Wessels contradicted Carriveaux with respect to the alleged individual nature of Wierzbicki's complaints. Contrary to Carriveaux, he testified that Wierzbicki stated in response to an unspecified Carriveaux remark, "What do you mean we're not human?" Wierzbicki's overall testimonial demeanor was subdued, dispassionate, and spontaneous. Carriveaux was extremely hesitant throughout, often delaying and calculating his responses before giving them. He lacked fluency and conviction. The most credible witness, however, was Landenberg. He testified as to detailed facts. He was cooperative and responsive in direct and cross-examination. Where unsure of his recollection, he would say so. His testimony was fluent, spontaneous, and convincing. As a present employee of the Respondent, he had nothing to gain except his employer's displeasure for testifying as a General Counsel witness. However, not all of his testimony was fully supportive of Wierzbicki's testimony. I found him to be the most objective and credible witness and rely essentially on his testimony, as well as uncontradicted testimony of other witnesses, which is not mutually inconsistent, in making the following findings as to what conduct Wierzbicki engaged in on September 11, 1997.

Carriveaux had joined the meeting at 3:40 p.m. and had taken the floor from Ornowski. He commenced to explain that the Respondent's profitability and production were being impacted by a high scrap rate and instructed that the employees should try to increase production from 50 parts a day to 60 parts, which could be accomplished if they all gave an extra effort. He then stated that the employees needed to care about their jobs and that the machinists were making "silly, stupid" mistakes and that there was a need for them to work as a team and watch their machines at all times. At about this time, Wierzbicki spontaneously interjected the following loud comment from his seated position, "Don't you think we give a f - - - about our work? Are you saying Tom, we don't give a f - - - about our jobs?" and also "God damn it, don't you think were are human beings; we are human beings, we are machinists and we make mistakes." He alluded to errors caused by the CAD room and errors in blueprints and improper tooling, which caused machinists' errors. Carriveaux coolly and evenly responded that the employees could accomplish improved production if they increased their work efforts and that he was not asserting that they did not care about their work, but that the Respondent needed an 8-percent increase in production because it was hurting financially from poor production. He then stated that the employees would work as a team and whoever will not be working as a team and "whoever will cause dissension will no longer be working here." Wierzbicki retorted, "What are you saying then, that I'm going to be fired just because I'm saying you don't think we give a f - - -?" Carriveaux answered: "What I am saying is anyone causing dissension and not willing to work as a team in the shop will no longer be employed here." Another employee started to say something but Carriveaux stopped him, saying "this is getting out of hand gentlemen; we are not going there. Let's stop it right now." The other employee stopped talking. Wierzbicki asked Carriveaux whether he had ever made any mistakes. Carriveaux answered "yes." Wierzbicki again said "we are all human beings, we make mistakes." Carriveaux told Wierzbicki that he had ruined the meeting. Whether from his original position or whether he had moved to the doorway, Carriveaux told Wierzbicki, "Why don't you get up right now and get out of here." Inasmuch as Landenberg could not effectively corroborate Wierzbicki that Carriveaux departed first, I credit the Respondent's witnesses that Wierzbicki departed first, as it is the more probable sequence of events that the offended manager who ordered an employee to depart would not himself depart before that employee.

With respect to testimony as to hearing the timeclock cycle outside in the hallway, I find such to be unconvincing given the distance involved and the ensuing hubbub of "gossip" among the audience. Wessels admittedly did not hear it. In any event, no one actually saw Wierzbicki punch out before Carriveaux confronted him. I find that if Wierzbicki had intended to voluntarily quit or insubordinately walk out of the building without permission, he would not have waited for Carriveaux at the timeclock to inquire as to his work status as Carriveaux admitted that he did so. Even if he had punched out, Wierzbicki did not leave until he asked Carriveaux whether he still had a job. It is Carriveaux's testimony that his exact response was: "Randy, I didn't say that." He testified in explanation for this ambiguous response, "Because there's no way that I was going to say that—in the heat of the moment." The implication for this unfulfilled explanation is that he was afraid to tell Wierzbicki he had been fired, because if he had not fired him then, a statement of reassurance of nondischarge certainly would defuse—not inflame—emotions.

I discredit Carriveaux's testimony, contradicted even by Wessels, that Wierzbicki voiced only his individual complaint and simply argued that problems were not his individual fault. I discredit also his half-hearted, uncertain denials, i.e., "I don't think so," regarding Wierzbicki's statement "we are all human beings [and] we all make mistakes." I discredit the initial implication in his testimony that Wierzbicki had engaged in an upright standing, menacing posture and find that in any event, he was separated from Wierzbicki by a distance of 6 to 8 feet and by a lunchroom dining table. I find it difficult to believe that Carriveaux was exposed to any actual menacing conduct by Wierzbicki before he was ordered to leave the lunchroom, and I discredit his testimony that he was put in fear by any conduct of Wierzbicki up to that point. There is no evidence that any employee or manager present had made any movement to intercede physically or otherwise to come to the assistance of a plant manager, thus indicating the lack of any palpable menacing conduct.

I credit Landenberg that there was nothing in Wierzbicki's body language or posture to warrant perception of a fear that he was out of control or was acting in a threatening manner. I conclude that he angrily got up and slapped or banged the top of the lunchroom table after he was told to leave. Wessels and Ornowski testified that Wierzbicki loudly interrupted Carriveaux and very loudly engaged in a one-on-one confrontation with him to the point of yelling or "almost" yelling his comments and that the meeting did not proceed as Ornowski and

Carriveaux intended and that it appeared that Wierzbicki was taking control of it. Neither of them, however, testified to any menacing behavior by Wierzbicki nor as to clenching of fists. I find that Wierzbicki had not engaged in any physically intimidating conduct to cause any reasonable fear of harm prior to being ordered to leave. Inasmuch as he simply got up and departed very quickly by all accounts, I find that he did nothing to arouse any reasonable fear of assault in the lunchroom even if he did strike the tabletop with his hand.

However, I do conclude, as testified to by Landenberg, that Wierzbicki was angry and visibly upset during the confrontation whereas Carriveaux remained calm and responded to Wierzbicki in a quieter voice until he ordered him out. Because of what Landenberg perceived to be a disrespectfully loud and profane confrontation with the plant manager, he thought to himself that "this meeting's gotten way out of hand," and he testified that it appeared that Wierzbicki "took control of the whole meeting."

Because of the lack of credibility that I have found regarding Carriveaux's testimony regarding the substance of the preceding confrontation and his lack of credibility as to the date of the discharge and the confrontation of September 12, I must discredit his testimony regarding the timeclock confrontation.

I further find that it was not reasonable for Carriveaux to feel intimidated because of Wierzbicki's loud and profane language. It is undisputed that employees have argued vigorously and profanely with supervisors. It is undisputed that such vigorous arguments have occurred at past such meetings, had been tolerated, and that Carriveaux was aware of that past practice. It is undisputed that vulgar and profane language is prevalent in shoptalk. It is undisputed that Wierzbicki normally has a robust, resonant voice and has had a reputation for tolerated argumentation at plant meetings. It is undisputed that Carriveaux intended to elicit employee response at the meeting. It is admitted that Carriveaux rose from the ranks and had been exposed to production shop vulgarity for 11 years as a nonsupervisory employee. I conclude that nothing in Wierzbicki's language, voluble tone, or body movements provided any reasonable basis for Carriveaux to fear violence. However, it is also undisputed that his meeting agenda was sidetracked and he was subjected to the rough language interruptions of Wierzbicki. Yet, Wierzbicki left the room when ordered to do so and could have been ordered to leave at any point Carriveaux wanted to regain any control he felt was being lost to the employee. Initially, Wierzbicki was not ordered to stop talking and, thus, did not disobey any direct order to engage in a discourse.

C. Analysis

Wierzbicki had previously engaged in a tolerated practice of employee meeting disputation, albeit such experience involving a plant manager was unprecedented. Yet, the semi-formal arrangement of sitting around lunchroom tables did not explicitly discourage such disputation.

I have concluded Carriveaux's proffered discharge justification of insubordination, failing to follow an order, or abandoning work, to be contrived and trumped up. The evidence reveals that aside from the manner of disputation, there is no basis for such allegation. Carriveaux testified that his meeting was disrupted by Wierzbicki; yet, he could have asserted managerial authority by forcefully refusing to engage in a one-to-one disputation at the very beginning. Carriveaux's proffered justifications are found above to be shifting and false. I must infer then that the false reasons were contrived to mask another potentially unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Abbey's Transportation Services Inc. v. NLRB*, 837 F.2d 575, 579 (2nd Cir. 1988); *Rain Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). I conclude that the real basis for the discharge, which occurred on September 11, can be found in the dialogue between Carriveaux and Wierzbicki. As soon as Wierzbicki defended the work ethic of his fellow employees, which he perceived was being impugned by Carriveaux, i.e., the premise being that employees were not working hard enough, and as soon as Wierzbicki reacted adversely to Carriveaux's demand for less scrap and increased production which he asserted could be achieved by great team effort, Carriveaux revealingly perceived such criticism as dissension, punishable by discharge. He did so because Wierzbicki's protest implied that the lack of teamwork was not causing a lower production. Thus, Wierzbicki immediately perceived Carriveaux's response to contain an implicit threat—if you disagree, you will be a dissenter subject to discharge. I conclude that it was not Wierzbicki's manner of protest that upset Carriveaux at the meeting but rather the substance of it, the very fact that it was made.

The next issue to be resolved is whether the aforesaid conduct by Wierzbicki found to have motivated his discharge is concerted, or individual activity as is argued by the Respondent.

The Respondent argues as follows:

> It is urged that the Board's long stated principle as articulated in *Kotzin Co.*, 271 NLRB No. 196, [1200], 117 LRRM 1099 (1984), applies to this case. The *Kotzin* case was one of the first to apply the Board's new test in determining whether given conduct was protected concerted activity. The new test, which overruled *Alleluia Cushion Co.*, 221 NLRB 999, 91 LRRM 1131 (1975), was adopted in *Meyers Industries*, 268 NLRB 493 (1984), 115 LRRM 1025 (1984). The new test was and continues to be:
>
> The activities of a single employee will not be found to be "concerted" within the meaning of the Act unless they are engaged in *with or on the authority of other employees* and not solely by and on behalf of the employee himself. (Emphasis added.)
>
> The Alleluia standard calls for a more liberal definition of concerted activity. The Board considered employee conduct to be concerted if it involved an issue of common concern to other employees. This test of "implied consent" of fellow employees was rejected by the Board in 1984 in the *Meyers Industries* case. Under the *Meyers* standard, the employee must be acting on the authority of other employees in order for the conduct to be concerted. In short, it is no longer sufficient for the General Counsel to simply set out the subject matter that is of alleged concern to a group of employees. General Counsel in the case herein produced no evidence that Wierzbicki was acting

with the authority of other employees on September 11 and 12, 1997.

The facts found here, however, disclose that Wierzbicki participated in and was at least exposed to joint employee, premeeting discussion during which a common consensus was reached of resentment toward the Respondent's blame for loss of profitability on the quality and quantity of production workers' efforts and its demand for increased productivity and reduction of scrap. Wierzbicki uttered this protest at the meeting as a protest on behalf of his coworkers and phrased it as such. Even had he not engaged in the premeeting discussions, clearly his protest, as phrased, constituted an appeal to the audience of coworkers to support the protest and, as such, constituted a first step toward concerted activities for the employees' mutual benefit.

The counsel for the Acting General Counsel appropriately argues:

> Section 7 of the National Labor Relations Act, herein the Act, gives employees the right ". . . to engage in self organization, . . . and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection." The Board has repeatedly held that "the guarantees of section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self organization." *Whittaker Corp.*, 289 NLRB 933 (1988), citing *Meyers Industries*, 268 NLRB 493, 494 (1984) (*Meyers I)* remanded under the sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986) (*Meyers II)*, enfd. [affd.] sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 128 LRRM 2664 (1988); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969). In *Whittaker*, the Board also held that "in a group meeting context, a concerted objective may be inferred from the circumstances." Supra, at 934.

The *Whittaker* decision is aptly cited as a case also involving an employee meeting at which the employer's announcement of a suspension of an annual wage increase was protested by an employee who, it was found, was unlawfully terminated for that concerted protected activity.

Also cited by the counsel for the Acting General Counsel in agreement is *Imaging and Sensing Technology Corp.*, 302 NLRB 531 (1991), which involved similar circumstances. The Board in *Whittaker* cited another factually similar case involving an employee who protested a demand for increased productivity at a group meeting and in consequence was discharged unlawfully. *Enterprise Products*, 264 NLRB 946 (1982). The administrative law judge whose decision was adopted by the Board stated as follows in *Grimmway Enterprises,* 315 NLRB 1276, 1279 (1995):

> There is, of course, no question that raising questions of common concern at meetings with company officials is usually a concerted act, particularly when the first person plural is used by the employee. See *Colders Furniture*, 292 NLRB 941 (1989), enfd. 907 F.2d 765 (7th Cir. 1990). That is true even where the employee has not actually been appointed the group spokesman. The Board will usually regard that step as an essential preliminary to the inducement of group action. See *Whittaker Corp.*, 289 NLRB 933 (1988). *Whittaker*, like *Colders Furniture*, is also a first person plural case where the employee spoke up at company meeting. See also *Autumn Manor*, 268 NLRB 239, 244 (1983). Those cases protect what might otherwise be regarded as ambiguous conduct by the employee.

I conclude that Wierzbicki was discharged for what constituted concerted activity, which would be protected by the Act unless that protection was forfeited because of misconduct during the course of that activity.

In *Atlantic Steel Co.*, 245 NLRB 814 (1979), the Board stated:

> . . .the Board and the courts have recognized . . . that even an employee who is engaged in concerted protected activity can by opprobrious conduct, lose the protection of the Act.
>
> The decision as to whether the employee has crossed the line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. [Footnote omitted.]

And in *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), the court stated:

> As other cases have made clear, flagrant conduct of an employee, even though occurring during the course of Section 7 activity, may justify disciplinary action against the employer. On the other hand, not every impropriety committed during such activity places the employees beyond the protective shield of the Act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946). Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not to be disturbed.

In *Consumers Power Co.*, 282 NLRB 130, 132 (1986), the Board observed:

> . . . where an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service.

In *Health Care & Retirement Corp.*, 306 NLRB 63, 65 (1992), citing, inter alia, *Consumer*, supra, the Board summarized the state of applicable laws as follows:

> The Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is al-

> lowed in terms of the manner in which they conduct themselves. The Board and courts have found, nonetheless, that an employee's flagrant, opprobrious conduct, even though occurring during the course of Section 7 action, may sometimes lose the protection of the Act and justify disciplinary action on the part of an employer. Not every impropriety, however, places the employee beyond the protection of the Act. For example, the Board and the courts have found foul language or epithets directed to a member of management insufficient to require forfeiting employee protection under Section 7.

Finally, protection is not denied to an employee regardless of the inaccuracy or lack of merit of the employee's statements absent deliberate falsity or maliciousness, even where the accusatory language used is stinging and harsh. *Delta Health Center, Inc.*, 310 NLRB 26 (1993).

In this case, the Respondent's position that Wierzbicki lost the protection of the Act, because he engaged in demeaning, disruptive, disrespectful conduct toward the plant manager in full view of other employees, is undermined by the testimony of Carriveaux. That shifting testimony revealed that Carriveaux felt constrained to contrive false allegations of postmeeting insubordination because he himself believed that Wierzbicki's conduct at the meeting was insufficient to warrant discharge. Thus, he rejected the Respondent's counsel's leading examination when he characterized that conduct as merely "technically insubordinate." Even that acquiescence with the leading question was reluctant. In the course of his shifting testimony, Carriveaux revealed that he did not view the September 11 confrontation as serious enough to render Wierzbicki unfit for further service, as he supposedly would have continued to employ him had it not been for postmeeting insubordination, which in fact did not occur.

I conclude that in the circumstances of this case, Wierzbicki's disrespectful conduct was not so egregious as to take him outside the protection of the Act.

I find that Wierzbicki's protected activity was the sole motivation for the discharge and that the proffered reasons of insubordination were pretextuous. I therefore necessarily conclude that the Respondent did not meet its burden of proving that it would have discharged Wierzbicki in any event, regardless of the unlawful motivation factor. *Wright Line*, 251 *NLRB* 1083 (1980).

I, therefore, find that by the discharge of its employee, Randy Wierzbicki, on September 12, 1997, the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint and engaged in an unfair labor practice affecting commerce within the meaning of the Act.

REMEDY

Having found that the Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. Having found that the Respondent unlawfully discharged Randy Wierzbicki, I recommend that it be ordered to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, CKS Tool & Engineering, Bad Axe, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their concerted activities protected by the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Randy Wierzbicki full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Randy Wierzbicki, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its Bad Axe, Michigan facility, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all current employees and former employees employed by the Respondent at any time since September 12, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 17, 1998

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees because of their concerted activities protected by the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Randy Wierzbicki full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this Decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Randy Wierzbicki, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

CKS TOOL & ENGINEERING, INC. OF BAD AXE